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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/872,300	05/31/2001	Andrew Thomson	5150-46100	2378
35690 7590 10/22/2009 MEYERTONS, HOOD, KIVLIN, KOWERT & GOETZEL, P.C. P.O. BOX 398 AUSTIN, TX 78767-0398				
EXAMINER BURGESS, BARBARA N				
ART UNIT 2457		PAPER NUMBER		
NOTIFICATION DATE 10/22/2009		DELIVERY MODE ELECTRONIC		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANDREW THOMSON

Appeal 2009-001259
Application 09/872,300¹
Technology Center 2400

Decided: October 20, 2009

Before LANCE LEONARD BARRY, JEAN R. HOMERE, and CAROLYN
D. THOMAS, *Administrative Patent Judges*.

HOMERE, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ Filed on May 31, 2001. The real party in interest is National Instruments Corp. (App. Br. 2.)

I. STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 82 through 106. Claims 1 through 81 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

Appellant's Invention

Appellant invented a method, apparatus, and computer-accessible memory medium for providing web server capabilities for existing instruments without inherent networking capabilities. (Spec. 8, ll. 2-4.) In particular, an instrument server connected to a network operates to provide network server capabilities for one or more instruments. (*Id.* at 9, ll. 10-12.) Further, a client system controls the one or more instruments by executing a client web browser that accesses the respective instruments through a network. (*Id.* at 9, ll. 12-14.) Additionally, the client system works in conjunction with the instrument server to communicate with the one or more instruments via a bus by utilizing instrument drivers. (*Id.* at 9, ll. 17-20.)

Illustrative Claim

Independent claim 82 further illustrates the invention as follows:

82. A method comprising:

a first device coupled to a network sending a request to a second device coupled to the network to access a traditional instrument, wherein the traditional instrument is coupled to the second device via an instrumentation bus, wherein an instrument driver is required by the second device to communicate with the traditional instrument, wherein the second device is not configured with the instrument driver, wherein the traditional instrument does not include inherent Internet capabilities, and wherein the instrumentation bus is not the Internet;

the second device receiving the request to access the traditional instrument;

the second device receiving the instrument driver in response to said receiving the request to access the traditional instrument, wherein the instrument driver is downloaded directly from the network, and wherein the instrument driver is usable by the second device to communicate with the traditional instrument;

the second device accessing the traditional instrument via the instrumentation bus in response to said request to access the traditional instrument;

the traditional instrument sending instrument data to the second device via the instrumentation bus in response to the second device accessing the traditional instrument;

the second device receiving the instrument data sent from the traditional instrument via the instrumentation bus; and

the second device sending the instrument data to the first device via the network.

Prior Art Relied Upon

The Examiner relies on the following prior art as evidence of unpatentability:

Nagaoka	2002/0180579 A1	Dec. 5, 2002 (PCT filed Sep. 27, 2001) ²
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Rejections on Appeal

The Examiner rejects the claims on appeal as follows:

² The PCT filing date of Sep. 27, 2001, relies on the foreign priority of application 2000-295110, filed on Sep. 27, 2000.

1. Claims 93 and 97 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention.

2. Claims 82 through 106 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Nagaoka.³

Appellant's Contentions

1. Appellant contends that the Examiner erred in concluding that claims 93 and 97 are indefinite. In particular, Appellant argues that the “and/or” clause is not a contradictory statement since an ordinarily skilled artisan would understand that the “and/or” clause is an inclusive “or” conjunction for two or more phrases. (App. Br. 11; Reply Br. 4.) Further, Appellant argues that the phrase “the processor to communicate and/or control” means that the processor can communicate, control, or communicate and control and, therefore, reinterpreting the “and/or” clause is inappropriate. (Reply Br. 4.)

2. Appellant contends that Nagaoka does not teach a first device coupled to a network sending a request to a second device coupled to a network to access a traditional instrument, wherein the second device is not configured with the instrument driver, and, further, the second device receiving the instrument driver in response to receiving a request to access the traditional instrument, as recited in independent claim 82. (App. Br. 11-13; Reply Br. 5-6.) According to Appellant, Nagaoka discloses a home network management system which enables a user to remote control home-located electronic devices by requiring a user to manually install new driver

³ In the listing of claims provided by Appellant in the Appeal Brief, claim 92 depends from cancelled claim 1. For purposes of appeal, we will treat claim 92 as depending from independent claim 82.

software corresponding to a new home-located electronic device. (*Id.*) Appellant argues that Nagaoka's disclosure of manually installing driver software does not amount to the second device receiving the instrument driver in response to receiving the request to access the traditional instrument, as required by the instant claim. (*Id.*)

Examiner's Findings and Conclusions

1. The Examiner concludes that claims 93 and 97 are indefinite because the "and/or" clause is unclear. In particular, the Examiner finds that it is unclear as to whether Appellant is interpreting the "and/or" clause as "the processor to communicate and control" or "the processor to communicate or control." (Ans. 15.) For examination purposes, the Examiner interprets the "and/or" clause as "the processor to communicate or control." (Ans. 15.)

2. The Examiner finds Nagaoka's disclosure of a terminal device sending a request to a home server for performing remote access and control of a home-located electronic device, in conjunction with downloading driver software from a management facility via the network whereby the driver software is used by the home server to control the home-located electronic device, teaches the cited limitations. (Ans. 15-16; 20-21.)

II. ISSUES

1. Has Appellant shown that the Examiner erred in concluding that claims 93 and 97 are indefinite? In particular, this issue turns on whether an ordinarily skilled artisan would have been apprised of the scope of the "and/or" clause?

2. Has Appellant shown that the Examiner erred in finding that Nagaoka anticipates independent claim 82? In particular, this issue turns on whether:

(a) Nagaoka teaches a first device coupled to a network sending a request to a second device coupled to a network to access a traditional instrument, wherein the second device is not configured with the instrument driver, as recited in independent claim 82?

(b) Nagaoka teaches the second device receiving the instrument driver in response to receiving a request to access the traditional instrument, as recited in independent claim 82?

III. FINDINGS OF FACT

The following Findings of Fact (“FF”) are shown by a preponderance of the evidence.

Nagaoka

1. Nagaoka generally relates to a method for remote control of home-located electronic devices and a management facility. (Pg. 1, Para. [0001].) Nagaoka’s Figure 1 depicts a home network management system comprising a plurality of terminals (1), mobile packet communication network (2), gateway server (3), the Internet (4), home network management facility (5), a plurality of home networks (6), and notification server (7). (Pg. 4, Para. [0082].) In particular, Nagaoka discloses a home network (6) installed in a respective house. (Pg. 5, Para. [0090].) The home network (6) comprises a home server (61), a home-located electronic device group (62), and a security system (63), each of which are mutually connected by home bus (64). (*Id.*) Further, Nagaoka discloses that the home-located electronic

devices in the home-located electronic device group are a microwave, a rice cooker, a refrigerator, lighting fixtures, an air conditioner, a video recorder, a gas leakage detection device, a water heater and so forth. (Pg. 5, Para. [0091].) Each home-located electronic device has a function to communicate with the home server (61) via home bus (64). (*Id.*)

2. Nagaoka's Figure 1 discloses that terminal (1) communicates directly with home network management server (5) through a World Wide Web ("WWW") browser and an access browser. (Pg. 5, Para. [0086].) In particular, Nagaoka discloses displaying a screen for prompting the user to input control instructions of the home-located electronic devices on the display of terminal (1). (Pg. 10, Para. [0179].) Further, the home network management facility (5) manages the home network (6). (Pg. 5, Para. [0095].) Therefore, when the home network management facility (5) receives a control instruction for remote control from a user of terminal (1), home network management facility (5) seeks for home network (6) corresponding to the user, and transmits the received control instruction to home server (61) in home network (6) via mobile packet communication network (2). (*Id.*) Additionally, when a user requests status information by utilizing terminal (1), the status information is transmitted to home server (61) corresponding to the user via home network management facility (5). (Pg. 6, Para. [0111].) Nagaoka's Figure 2 depicts that control unit (611) in home server (61) transmits home-located electronic device categories provided in status information table TBL1-*m*, and the status information to home network management facility (5) when receiving the status information request. (*Id.*)

3. Nagaoka discloses that the management facility comprises driver software for performing control of home-located electronic devices controlled by a server connected to the management facility via a network. (Pg. 3, Para. [0041].) In particular, the terminal transmits to the management facility a request signal showing that the driver software is downloaded from the management facility by the server and an identifying signal. (*Id.*) Further, the management facility transmits to the server corresponding to the identifying signal the driver software corresponding to the request signal. (*Id.*) As depicted in Nagaoka's Figure 2, the home server (61) comprises a control unit (611) containing a hard disk that stores the driver software for controlling home-located electronic device group (62). (Pgs. 5-6, Para. [0099], [0100].)

IV. PRINCIPLES OF LAW

Indefiniteness

A claim is indefinite if, when read in light of the specification, it does not reasonably apprise those skilled in the art of the scope of the invention. *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1342 (Fed. Cir. 2003) (citations omitted). In particular, our reviewing court held that the claim as a whole must be considered to determine whether the claim apprises one of ordinary skill in the art of its scope, and therefore serves the notice function required by 35 U.S.C. § 112, second paragraph, by providing clear warning to others as to what constitutes the infringement of the patent. *Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379 (Fed. Cir 2000) (citations omitted). If the language of the claim is such that a person of ordinary skill in the art could not interpret the metes and bounds of the

claims so as to understand how to avoid infringement, a rejection of the claim under 35 U.S.C. § 112, second paragraph, is deemed appropriate. *Morton Int'l, Inc. v. Cardinal Chem. Co.*, 5 F.3d 1464, 1470 (Fed. Cir. 1993).

Anticipation

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharmaceutical Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) (citing *Minn. Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559, 1565 (Fed. Cir. 1992)).

Anticipation of a patent claim requires a finding that the claim at issue ‘reads on’ a prior art reference. In other words, if granting patent protection on the disputed claim would allow the patentee to exclude the public from practicing the prior art, then that claim is anticipated, regardless of whether it also covers subject matter not in the prior art.

Atlas Powder Co. v. IRECO, Inc., 190 F.3d 1342, 1346 (Fed Cir. 1999)
(internal citations omitted).

V. ANALYSIS

35 U.S.C. § 112, Second Paragraph, Rejection

We do not agree with the Examiner’s conclusion that the “and/or” clause in claims 93 and 97 is indefinite. An ordinarily skilled artisan would readily understand that the “and/or” clause in the phrase “the processor to communicate and/or control” means that the processor can communicate, control, or communicate and control. Therefore, an ordinarily skilled artisan would understand that a broad, but reasonable interpretation of the phrase

“the processor to communicate and/or control” is “the processor to communicate or control.” It follows that Appellant has shown that the Examiner erred in concluding that claims 93 and 97 are indefinite.

35 U.S.C. § 102(e) Rejection

Claims 82 through 85, 88 through 90, 105 and 106

Independent claim 82 recites, in relevant parts:

1) a first device coupled to a network sending a request to a second device coupled to a network to access a traditional instrument, wherein the second device is not configured with the instrument driver; and 2) the second device receiving the instrument driver in response to receiving a request to access the traditional instrument.

As detailed in the Findings of Fact section above, Nagaoka discloses a remote terminal connected to a home network management facility and a home server via the Internet. (FF 1.) In particular, the home server is connected to a plurality of home-located electronic devices via a bus. (*Id.*) Further, based on a request from the remote terminal, the home network management facility transmits a driver software for accessing and controlling a home-located electronic device to the home server via the Internet. (FF 3.) We find that Nagaoka’s disclosure teaches that the remote terminal sends a request to the home server via the home network management facility to access and control a home-located electronic device. Further, we find that the home server receives the driver software for accessing and controlling a specific home-located electronic device from the home network management facility based on a request from the remote terminal. Thus, we find that the cited disclosure of Nagaoka teaches the disputed limitations, as set forth above. It follows that Appellant has failed

to show that the Examiner erred in finding that Nagaoka anticipates independent claim 82.

Appellant does not provide separate arguments with respect to claims 83 through 85, 88 through 90, 105, and 106. Therefore, we select independent claim 82 as being representative of the cited claims. Consequently, Appellant has not shown error in the Examiner's rejection of claims 83 through 85, 88 through 90, 105, and 106 for the reasons set forth in our discussion of independent claim 82 above. 37 C.F.R. § 41.37(c)(1)(vii).

Claims 86 and 87

Appellant contends that Nagaoka's disclosure of providing information from the terminal to the home server via the home network management facility does not teach that the user input that generates the request to access the traditional instrument is received by a web browser in a web page provided by the second device, as recited in dependent claim 86. (App. Br. 14; Reply Br. 6-7.)

As detailed in the Findings of Fact Section above, Nagaoka discloses that the remote terminal communicates directly with the home network management facility through a web browser. (FF 2.) In particular, Nagaoka discloses that a user is prompted to input control instructions for the home-located electronic devices on the display of the remote terminal. (*Id.*) Therefore, when the home network management facility receives access and control instructions from the remote terminal, the home network management facility transmits the received access and control instructions to the home server via the Internet. (*Id.*) We find that Nagaoka's disclosure teaches that the remote terminal requests access and control of home-located

electronic devices from the home server via the home network management facility by inputting instructions into a web browser displayed on the remote terminal. However, we find that the cited disclosure falls short of teaching that the web page displayed on the web browser is provided by the second device. Although Nagaoka discloses that the remote terminal requests access and control of home-located electronic devices from the home server by inputting instructions into a web browser displayed on the remote terminal, an ordinarily skilled artisan would view Nagaoka's disclosure as a mere suggestion that the web page in the web browser may be provided by the home server. While such a suggestion might be adequate to show obviousness, it is insufficient to show anticipation. Absent a showing that Nagaoka expressly or inherently describes that the web page displayed in the web browser is provided by the home server, we find that the Examiner has improperly relied upon Nagaoka's disclosure to teach the disputed limitation. It follows that Appellant has shown that the Examiner erred in finding that Nagaoka anticipates dependent claim 86.

Because claim 87 also recites the limitation discussed above, we find that Appellant has also shown error in the Examiner's rejection of this claim for the reasons set forth in our discussion of dependent claim 86.

Claims 96 and 100

Dependent claims 96 and 100 recite, in relevant part, the program instructions are further executable by the processor to transmit a web page to the network, wherein the web page comprises the data.

As set forth above, we find that Nagaoka's disclosure teaches that the remote terminal requests access and control of home-located electronic devices from the home server via the home network management facility by

inputting instructions into a web browser displayed on the remote terminal. In particular, we find that by allowing users to input instructions into a web browser displayed on a remote terminal in order to access and control home-located electronic devices, Nagaoka teaches that the remote terminal transmits a web page containing instructions for accessing and controlling home-located electronic devices via a network. Thus, we find that the cited disclosure of Nagaoka teaches the disputed limitation. It follows that Appellant has failed to show that the Examiner erred in finding that Nagaoka anticipates dependent claims 96 and 100.

Claim 91

Appellant contends that Nagaoka's disclosure of various communication standards utilized by the home server to control home-located electronic devices does not teach detecting one or more traditional instruments coupled to the instrumentation bus including the traditional instrument, as recited in dependent claim 91. (App. Br. 15.) As detailed in the Findings of Fact section above, Nagaoka discloses that when the remote terminal requests status information, the status request is transmitted to the home server via the home network management facility. (FF 2.) In turn, the home server transmits the status information of each home-located electronic device to the remote terminal via the home network management facility. (*Id.*) Further, as set forth above, the home server is connected to the home-located electronic devices via a bus. (FF 1.) We find that Nagaoka's disclosure teaches that the remote terminal requests and receives access, control, and status updates of home-located electronic devices from the home server via the home network management facility. In particular, we find that that in order to access and control the home-located electronic

devices, the remote terminal needs to first detect the home electronic devices coupled to the home server via the bus. Therefore, Nagaoka does teach one or more traditional instruments coupled to the instrumentation bus including the traditional instrument, as recited in dependent claim 91.

Further, Appellant argues that Nagaoka's disclosure of transmitting status information of a home-located electronic device does not teach receiving instrument information from each of the detected one or more traditional instruments, as recited in dependent claim 91. (App. Br. 15.) As detailed in the Findings of Fact section above, Nagaoka discloses that when the remote terminal requests status information, the home server transmits the status information for each home-located electronic device in an information table. (FF 2.) We find that Nagaoka's disclosure of the remote terminal requesting status information and the home server transmitting a status information table amounts to the remote terminal receiving status information about each home-located electronic device from the home server. Therefore, we find that Nagaoka's disclosure of the remote terminal receiving status information about each home-located electronic device from the home server teaches receiving instrument information from each of the detected one or more traditional instruments, as recited in dependent claim 91.

Additionally, Appellant contends that Nagaoka's disclosure of security access and status information does not teach wherein the one or more traditional instruments are user-selectable from the first device using the instrument information, as recited in dependent claim 91. (App. Br. 15.) As set forth above, we find that Nagaoka's disclosure teaches that the remote terminal receives status information about each home-located electronic

device from the home server. Further, we find that Nagaoka's disclosure teaches that the remote terminal sends a request to the home server via the home network management facility to access and control a home-located electronic device. In particular, we find that Nagaoka's disclosure of the remote terminal receiving status information about each home-located electronic device from the home server, in conjunction with the remote terminal requesting access and control of a home-located electronic device, amounts to selecting one or more home located electronic devices based on the status information. Thus, we find that the cited disclosure of Nagaoka teaches wherein the one or more traditional instruments are user-selectable from the first device using the instrument information, as recited in dependent claim 91. It follows that Appellant has failed to show that the Examiner erred in finding that Nagaoka anticipates dependent claim 91.

Claim 92

Appellant contends that that Nagaoka fails to disclose that the instrumentation bus is a general-purpose interface bus ("GPIB"), as recited in dependent claim 92. (App. Br. 15-16.) The amendment submitted in the Response to the Final Office Action filed February 22, 2007, was not entered by the Examiner. (App. Br. 5; 15-16.) Further, as admitted by Appellant, the claim language does not specifically require a GPIB instrumentation bus. (App. Br. 15-16.) Therefore, Appellant's argument is not commensurate in scope with the claim language. It follows that Appellant has failed to show that the Examiner erred in finding that Nagaoka anticipates dependent claim 92.

Claims 93 through 95

Appellant contends that Nagaoka fails to disclose a device which detects a first traditional instrument coupled to the instrumentation bus, wherein a first instrument driver is required by the device to communicate with the traditional instrument, wherein the device is not configured with the first instrument driver, as recited in independent claim 93. (App. Br. 16.) Appellant has failed to provide substantive arguments regarding the specific claim limitations of claims 93 through 95. Appellant recites the limitations of independent claim 93 verbatim and makes a general allegation that the cited text does not teach the claim language. (*Id.*) Appellant is reminded that a statement that merely points out what the claim recites will not be considered as an argument for separate patentability of a claim. 37 C.F.R. § 41.37(c)(1)(vii). Appellant is further reminded that a general allegation that the claim defines a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references does not constitute a persuasive response. 37 C.F.R. § 1.111(b). Therefore, Appellant's arguments are unpersuasive.

Appellant does not provide separate arguments with respect to claims 94 and 95. Therefore, we select independent claim 93 as being representative of the cited claims. Consequently, Appellant has not shown error in the Examiner's rejection of claims 94 and 95 for the reasons set forth in our discussion of independent claim 93 above. 37 C.F.R. § 41.37(c)(1)(vii).

Claims 97 through 99

Appellant contends that the Examiner's assertion that it would have been obvious to perform the claimed methods is erroneous because these

claims are rejected as being anticipated by Nagaoka. (Reply Br. 7.) Appellant's argument is unpersuasive because Nagaoka teaches each limitation of dependent claim 97. As set forth above, we find that Nagaoka's disclosure teaches that the remote terminal requests access, control, and status updates of home-located electronic devices from the home server via the home network management facility. Further, we find that the home server receives driver software for accessing and controlling a specific home-located electronic device from the home network management facility based on a request from the remote terminal. Additionally, Nagaoka discloses that the driver software is stored on a hard disk located in the home server. (FF 3.) In summary, we find that Nagaoka discloses the remote terminal detecting one or more electronic devices, receiving the respective driver software, and subsequently storing the respective driver software. Thus, we find that the cited disclosures of Nagaoka teaches detecting a second traditional instrument, receiving, from the network, a second instrument driver, and storing the second instrument driver in memory, as recited in dependent claim 97. It follows that Appellant has failed to show that the Examiner erred in finding that Nagaoka anticipates dependent claim 97.

Appellant does not provide separate arguments with respect to claims 98 and 99. Therefore, we select dependent claim 97 as being representative of the cited claims. Consequently, Appellant has not shown error in the Examiner's rejection of claims 98 and 99 for the reasons set forth in our discussion of dependent claim 97 above. 37 C.F.R. § 41.37(c)(1)(vii).

Claims 101, 102, 103, and 104

Appellant contends that Nagaoka's disclosure of a home server that executes driver software memorized in a hard disk to control home-located devices does not teach automatically receiving, from the network, the instrument driver which is associated with the traditional instrument, as recited in independent claim 101. (App. Br. 17.) As set forth above, we find that Nagaoka's disclosure teaches that the remote terminal sends a request to the home server via the home network management facility to access and control a home-located electronic device. (FF 1, 2.) Further, we find that the home server receives driver software for accessing and controlling a specific home-located electronic device from the home network management facility based on a request from the remote terminal. (FF 3). In summary, we find that Nagaoka's disclosure teaches automatically receiving the respective driver software for accessing and controlling a home-located electronic device from the home network management facility based on a request from the remote terminal. Thus, we find that the cited disclosure of Nagaoka teaches automatically receiving, from the network, the instrument driver which is associated with the traditional instrument, as recited in independent claim 101. It follows that Appellant has failed to show that the Examiner erred in finding that Nagaoka anticipates independent claim 101.

Appellant does not provide separate arguments with respect to claims 102 through 104. Therefore, we select independent claim 101 as being representative of the cited claims. Consequently, Appellant has not shown error in the Examiner's rejection of claims 102 through 104 for the reasons

set forth in our discussion of independent claim 101 above. 37 C.F.R. § 41.37(c)(1)(vii).

VI. CONCLUSIONS OF LAW

1. Appellant has shown that the Examiner erred in concluding that claims 93 and 97 are indefinite under 35 U.S.C. § 112, second paragraph.
2. Appellant has shown that the Examiner erred in finding that Nagaoka anticipates claims 86 and 87 under 35 U.S.C. § 102(e).
3. Appellant has not shown that the Examiner erred in finding that Nagaoka anticipates claims 82 through 85 and 88 through 106 under 35 U.S.C. § 102(e).

VII. DECISION

1. We reverse the Examiner's decision to reject claims 93 and 97 as being indefinite under 35 U.S.C. § 112, second paragraph.
2. We reverse the Examiner's decision to reject claims 86 and 87 as being anticipated under 35 U.S.C. § 102(e).
3. We affirm the Examiner's decision to reject claims 82 through 85 and 88 through 106 as being anticipated under 35 U.S.C. § 102(e).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRM-IN-PART

nhl

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